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NO. 75-1083

# In the Supreme Court of the United States

OCTOBER TERM, 1975

M. C. MANUFACTURING CO., INC., and
UNIVERSAL AUTOMATIC MACHINE CO., INC.,
*Petitioners,*

VS.

TEXAS FOUNDRIES, INC., and H/R PRODUCTS, INC.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, M. C. Manufacturing Co., Inc., and Universal Automatic Machine Co., Inc., (hereinafter collectively referred to as "Universal") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 21, 1975.

### OPINIONS BELOW

The opinion of the Court of Appeals is reported in 517 F. 2d 1059. No opinion was rendered by the district court.

## JURISDICTION

The judgment of the Court of Appeals was entered on August 21, 1975. A timely motion for rehearing was denied on November 12, 1975, and this petition is filed within ninety days of that date. This court's jurisdiction is invoked under 28 U.S.C. Sec. 1254 (1).

## QUESTIONS PRESENTED

Two questions are presented by this petition. One involves the Sherman Act, and the other involves the Robinson-Patman Act.

### The Sherman Act Question

The Court of Appeals held that petitioners-plaintiffs, Universal, had failed to prove "fact" of injury resulting from a Sherman Act Section 1 violation. The proof showed that as a result of a forbidden conspiracy, Universal's chief supplier, respondent-defendant Texas Foundries, Inc., extended a lower price quotation to petitioners-plaintiffs' competitor, respondent-defendant H/R Products, Inc., which enabled H/R to become successful bidder for a government contract to produce type "G" lifting plugs. The Court of Appeals concluded (1) that the price granted H/R by Texas Foundries could not be utilized by Universal in proving "fact" of injury, i.e., in establishing that Universal could have secured the award, and (2) the evidence revealed that a third company, i.e., Land-Air, Inc., was second low bidder and would have secured the award in the absence of the conspiratorially low price. The first question, therefore, consists of two parts:

1. Did the Court of Appeals for the Fifth Circuit correctly conclude that Universal failed to establish "fact" of injury where,
   (a) the evidence shows that by utilization of the same price extended by Texas Foundries

to H/R, Universal would have been the low bidder? and,

(b) the evidence reveals facts upon which the jury could justifiably conclude that the second low bidder, Land-Air, Inc., was not eligible for and would not have received the award even in the absence of the H/R bid?

**Robinson-Patman Act Question**

With respect to the Robinson-Patman Act claim, the proof shows that on November 12, 1971, Universal entered a purchase-order contract with Texas Foundries for rough-cast plugs at a price of 32.5-cents each, F.O.B. Texas Foundries Plant (Lufkin, Texas). On November 18, 1971, Texas Foundries quoted 32.5-cents per casting price F.O.B. Texas Foundries plant, in response to Universal's request for quotation upon which to base a bid for Government Contract No. DAAA-09-72-0208. Texas Foundries represented that this was the lowest price it could or would extend, but on November 29, 1971 (according to the finding of the jury) Texas Foundries quoted a price of 31¢ per casting F.O.B. South Bend, Indiana (H/R's place of business) to H/R. As a result of these discriminatory quotations, Universal did not receive the award of Government Contract DAAA-09-72-C-0208, and therefore,, obviously, did not purchase rough castings from Texas Foundries with which to fulfill such contract. However, Universal (pursuant to the November 12, 1971 purchase order) and H/R (pursuant to its November 29, 1971 agreement) both purchased the same item (the rough cast plugs) from Texas Foundries, at different prices and upon different freight terms, during the same period of time. Despite this, the lower court held that Universal failed to prove that the discriminatory purchases were 'in competition" and therefore no violation of Robinson-Patman was demonstrated. Accordingly, the Robinson-Patman Act question is:

2. Is a Robinson-Patman Act violation established, prima facie, when the proof shows that

competiting bidders for the same Government awards are being sold the same item, at discriminatory prices, during the same period of time, albeit for two different contract awards, where one of the bidders is prevented from securing one of the contract awards because of the discrimatory pricing?

## STATUTES INVOLVED

The statutory provisions involved are Section 1 of the Sherman Act (Title 15 U.S.C. Sec. 1), Section 2(a) and (f) of the Robinson-Patman Amendment to the Clayton Act, (Title 15 U.S.C. Sec. 14 (a) and (f) ) and Section 4 of the Clayton Act (Title 15 U.S.C. Sec. 15) which provide, in pertinent part:

Sherman Act Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal".

Robinson-Patman Act Section 2(a):

"It shall be unlawful for any person engaged in commerce in the course of such commerce, either directly or indirectly, to discriminate in price between purchasers, . . .".

Clayton Act Section 4:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States, . . ."

## STATEMENT OF THE CASE

The facts of the case are summarized, in general fashion, in the initial portion of the opinion of the Fifth Circuit Court of Appeals. Additional facts are noted in the sections of the opinion relating to the "Sherman Act Claim" and the "Robinson-Patman Claim". Those facts are accurate, except to the extent specifically challenged in this application. (An "in-depth" analysis of the facts is contained in Appellee's Brief filed in the Fifth Circuit Court of Appeals, to which reference may be had if necessary). With this qualification, the statement of the case by the lower court is adopted.

## REASONS FOR GRANTING THE WRIT

### Sherman Act Question

The opinion of the Fifth Circuit Court of Appeals recognizes that the jury was justified in finding a violation of Section 1 of the Sherman Act. The opinion states:

> "If plaintiffs' theory of the case and version of the evidence were accepted by the jury, as they may have been, then a Sherman Act violation has been established."

However, the opinion holds that the "fact" of injury has not been established because ". . .plaintiffs failed to establish that in the absence of the defendant's discriminatory pricing scheme Universal would have received this contract".

The Court of Appeals correctly notes that the bid of Universal on contract DAAA-09-72-C-0208 was the third low bid submitted, the first being that of the defendant H/R and the second being that of Land-Air, Inc. Universal demonstrated, using the same profit and cost factors employed in submitting its bid, that had it received the same price as was extended to H/R it would have been the successful bidder, i.e., its bid would

have been substantially lower than that of H/R.[1] This would have made Universal the low bidder, since the record shows that the only other company to obtain a price quotation from Texas Foundries for this contract was Deco-Grand, whose bid was not in contention (and who, therefore, would not benefit from the same bid revision).

The Fifth Circuit Court holds that this "conspiratorially low" price extended to H/R must be disregarded in determining the "fact" of injury, i.e., whether Universal would have been the successful bidder. This is a novel proposition, without precedent. It is contrary to concepts engrained in antitrust laws. Comparable assumptions have long been sanctioned in proof of the extent of damages. For example, *Wall Products Co. v. National Gypsum Co.*,357 F. Supp. 832, allowed plaintiffs to recover the difference in the price actually paid for wallboard, and the price which it was assumed Plaintiffs would have been paid absent the conspiracy. *Cherokee Laboratories v. Rotary Drilling Services,* 383 F. 2d 97 (5th Cir. 1967) cert. den. 390 U.S. 904 sanctioned the assumption by plaintiff of defendant's sales figures in making a damage projection (of lost profits). *Lehrman v. Gulf,* 464 F. 2d 26 (5th Cir. 1974) cert. den., 409 U.S. 1077, and *Terrell v. Household Goods Carriers Bureau,* 494 F. 2d 16 (5th Cir. 1974) upheld assumptions of projected sales figures based on opinion (expert and non-expert) evidence, and *Hobart Brothers Co. vs. Malcolm T. Gilliland, Inc.,* 471 F. 2d 894 (5th Cir. 1973) cert. den. 412 U.S. 923, holds that damage proof can be based on assumptions if the assumptions rest on an evidentiary base. Obviously, therefore, Universal could assume the lower sales price for the purpose of proving extent of damages. What logic is there, therefore, in denying its use to prove fact of damages?

Reasoning further, it is obvious that the "conspiratorially

---

[1] Mr. Merle Childress testified that had the lower price extended H/R been granted to Universal, Universal's bid would have been submitted on this basis, i.e., with profit and other cost factors the same.

low" price is a fact that is an integral part of the proof of the conspiracy and an overt action pursuant to the conspiracy. Why then, must it be ignored when determining "fact" of damage? The illogic of the proposition is compound.

Furthermore, the role of the Land-Air bid was not properly examined by the lower court, which held: "It is crystal clear that Land-Air was a viable bidder and that, even after disregarding H/R's low bid because of the special conspiratorially low price it received from Texas Foundries, Land-Air's bid stood between Universal and the opportunity to acquire this contract." The evidence is to the contrary for, even accepting the Court of Appeals' position that the "conspiratorially low" price must be ignored in ascertaining "fact" of damage, the jury was justified in finding that Universal would have received the award, and that Land-Air was not eligible for and would not have received it. Though it is adequately shown by the record, an affidavit obtained from a Land-Air executive and submitted to the Court of Appeals in connection with the petitioners-plaintiffs' motion for rehearing lays to rest any question on the point.

These propositions will be discussed separately, with the latter proposition being discussed first.

**1. Land-Air was not a viable bidder and did not stand between Universal and the opportunity to acquire the contract.**

Bids on the contract in question were opened on December 3, 1971. App. 456. The contract award was signed on December 30, 1971. P. Ex. 46, App. 1397, et. seq. The pre-award surveys were held, as they are customarily held, within the period from the date of the bid opening to the date of the contract award. App. 211. The purpose of the pre-award survey is succinctly stated in the testimony of Mr. Childress (App. 207):

> "Q. Now, what does the term - if you are familiar it (sic) in connection with your dealings with the government or APSA - called a 'pre-award survey'?

> "A. Upon notification that your company is either low bidder or within the realm of competitive prices, among the low bidders, then the government performs what they call a pre-award survey on usually the three low bidders. That is for the purpose of establishing qualifications of each company to ascertain the fact that they can perform if the government awards them the contract, at this pre-award survey where they delve into all aspects of your business".

The record reveals that there is a misconception and a misstatement in the following quotation critical to the lower court's opinion relating to the pre-award survey and Land-Air's status as a "viable bidder":

> "While it is true that Land-Air's bid was initially classified as nonresponsive and consequently Land-Air did not receive a pre-award survey, a memo from the APSA contracts specialist in charge of contract DAAA-09-72-C-0208 negotiations introduced at trial reveals that an amendment was received from Land-Air on December 1, which negated the previous nonresponsive action considered, and led to reinstatement of Land-Air's bid prior to award. It is crystal clear that Land-Air was a viable bidder and that, even after disregarding H/R's low bid because of the special, conspriatorially low price it received from Texas Foundries, Land-Air's bid stood between Universal and the opportunity to acquire this contract."

Land-Air's failure to receive a pre-award survey was not a consequence of the initial classification of Land-Air's bid as nonresponsive, though it is true that Land-Air's amendment caused a change in the previous classification, and was in time for the bid opening December 3, 1971. App. 1394. P. Ex. 43. The amendment was inadvertently misdirected and placed with the "no bid" responses, but this was corrected and the Bid Opening Officer and Recorder were notified of the error on December 17

1971, and corrective action was taken. App. 1394. This was well within the pre-award survey phase, as is evidenced by the fact that the pre-award survey of Universal Automatic Machine Company, Inc., was not made until December 16, 1971. P. Ex. 45, App. 1396.

Therefore, a pre-award survey could have been made prior to the bid award had Land-Air been considered for the award. But the record conclusively demonstrates that Land-Air received no pre-award survey and was not in position to be considered for the award, and therefore was not a "viable bidder".

H/R, Universal, and AMS Manufacturing, Inc. of Amityville, N. Y., were all subjected to pre-award surveys. AMS submitted the fourth low bid. P. Ex. 43, App. 1391. *Government regulations require a pre-award survey to determine whether a bidder is "responsible"* (to be distinguished from "responsive") *and entitled to an award.* Witness the following excerpts from the testimony of Anthony Costa, Supervisor Contracts Speicalist, Procurement Division, United States Army Ammunitions Command, Joliet, Illinois: (App. 397-399)

> "Q. What constitutes the evaluation phase? What specific activities and various distinct categories make up a part of the evaluation phase?
>
> "A. The first thing that would be considered is to review the bid packages of those within the zone of consideration of an award to verify that they are all responsive.
>
> "Q. What establishes the criteria for the zone of consideration?
>
> "A. Well, if one award is made - - it depends on the bid process. The one award is made and maybe ten bids submitted, and the first four maybe are close.
>
> "Then the balance on the remaining six, see, the prices are entirely cut of line, then you would concentrate

on the first four on this particular example I'm giving

"Q. Yes sir. You would select from all the bids those that appear to be more nearly competitive with each other as to price?

"A. Yes. You would include all bids in the evaluation but would concentrate on the low. You would check all the packages to see that they are all responsive to the invitation..

"Q. You probably have had occasion where bidders simply did not meet some specification in the invitation to bid and, therefore, would have to be eliminated?

"A. Yes. If a bidder is non-responsive, he can be eliminated.

"Q. Let me go on the record and ask you about this particular lift plug bid that we have identified and whether it had any restriction on it concerning the type of prime contractor that would have to be selected by you folks?

"A. Yes. This solicitation, the one you asked about - - Do you want me to repeat the number?

"Q. No, sir.

"A. It was a one hundred percent small business set-aside.

"Q. Could you tell us what that means?

"A. It was restricted to small business firms.

"Q. What is the next step, sir, in this part of the

evaluation phase?

"A. *The next step would be to request a pre-award survey on that firm or firms that you feel would have to be termed as responsible producers.*

"Q. What is a 'pre-award survey'? How would you define that for us?

"A. I think the name in itself indicates what it is. Do you want a better or different answer?

"Q. Let me ask you this: *Your rules and regulations require that a pre-award survey team be constituted to evaluate a certain number of bidders in a given contract to determine whether or not they are responsible bidders?*

"A. *Yes, sir."* (Emphasis supplied)

There is one instance in which a bidder can be determined to be "responsible" without a pre-award survey: (App. 410)

"Q. Do your regulations require a pre-award survey for any prime contractor under consideration to be awarded a bid?

"A. No.

"Q. In what instance would it not be?

"A. *Well, if we have records here to justify that that responsive bidder is responsible, we can make that decision with a Contract Officer's determination.*

"Q. *But in the instance we are talking about there was a pre-award survey on H/R and Universal and Amityville, New York.*

"A. *That's what the records show here.*" (Emphasis supplied)

This testimony in itself supports the conclusion that the jury reached, (i.e., that Universal would have received the award), since there was never a determination of any sort that Land-Air was a responsible bidder. But there is more support in the record.

First, one of the reasons for making the "responsible" determination is pertinent: (App. 419)

"Q. Do you require your potential prime contractors to advise you in this lift plug situation of their intended source of supply of raw castings?

"A. You mean prior to award?

"Q. Yes, sir.

"A. This is required in the pre-award survey.

"Q. Why is it required?

'A. Well, to assure he would be a responsible prime contractor; and to be a responsible prime contractor he has to show who he will get his supplies from."

This was never done with respect to Land-Air.

Next, the testimony elaborates on the basis for making a 'responsible" determination without a pre-award survey: (App. 428-430)

"CROSS EXAMINATION BY MR. HATHAWAY:

"Q. Now, can you give me the status of those four bidders after evaluation with reference to their relative

positions?

"A. Do you want them in order, sir?

"Q. As to who they were, yes, sir. In other words H/R must have been first; they got the contract?

"A. Yes.

"Q. Can we get the price now? I want to know who numbers two, three and four were after evaluation.

"A. The evaluated bid price for H/R is .47362, and the evaluated bid price for Universal is .49107. Is that all you want?

"Q. No. I want three and four. Who is that?

"A. The second one was Land-Air which was .48678. The third lowest was Universal Automatic Machine and I gave you that figure. The fourth lowest was AMS Manufacturing Incorporated, .517482.

"Q. If H/R Products had not bid that contract, or if for some reason they had indicated after opening for the bids that they could not perform and preferred not to perform, then who would have gotten the contract? Would it have been Land-Air?

"A. After opening bid, if they didn't want to perform, then they would have to go through regulatory procedures to withdraw their bid.

"Q. There is a regulatory procedure for this?

"A. Yes.

"Q. And if it had not taken place and Land-Air had

received the contract - -

"A. (interrupting) They would be the next lowest responsive. *I don't know if they were responsible or not, but if they had the pre-award and passed they would be next in line.*

"Q. We don't know if you had a 1524 on Land-Air did we?

"A. I didn't see it.

"Q. You didn't?

"A. No. There's reasons. *Maybe they were making the item at the time. I don't know. It could have been determined as a responsible procedure.*

"Q. Let me request at this point if upon signing this deposition if a Form 1524 can be found on Land-Air, would you then attach that as Defendant H/R Exhibit?

"A. Yes.

'Q. If one is found?

"A. Yes."

No. "1524", i.e., pre-award survey form, relating to Land-Air was ever found or attached, and it is obvious that no pre-award survey of Land-Air was ever made. Thus, under Costa's testimony, Land-Air could not have been "next in line", with no pre-award survey, unless determined by a contract officer to be "responsible". *There was no such determination.*

The record even conclusively demonstrates that Land-Air could not have been considered "responsible" without a pre-award survey. As noted in the lower court's opinion, Universal received the only government contract let in 1970. This contract

was awarded on June 16, 1970, and, with additions, was still being performed when the contract in question was let in December, 1971. Thus, it is obvious that Land-Air was not "making the item at the time". No basis existed for determining Land-Air to be responsible. There is not even the slightest hint in the record or in any of the papers relating to the award of the contract in question that Land-Air fell into any category that could be considered responsible without a pre-award survey. Even H/R, which has previously furnished more Type G lifting plugs to the government than any other known company, and Universal, which was in the process of satisfying the existing contract with the government, were required to have pre-award surveys. Furthermore, the contract in question had a 50-percent option provision. Since Land-Air's bid was very close to H/R's, if Land-Air had been a viable bidder, a survey would have been made to determine if Land-Air was eligible for one-half of the award.

It is therefore apparent that Land-Air was not the subject of a pre-award survey and was not considered for the bid award. The reason for this may not be clear in the record, though the jury could certainly conclude from the evidence that Land-Air was not "responsible". However, because of the lower court's opinion, an affidavit of the Chairman of the Board and Chief Executive Officer of Land-Air was obtained, which explains why Land-Air was not considered (and why Land-Air was obviously determined not to be "responsible"). It is here reproduced:

THE STATE OF TEXAS
COUNTY OF TARRANT
KNOW ALL PERSONS BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared PAT RUTHERFORD, who, being by me first duly sworn upon his oath states that he is over the age of 18 years and in no way incapacitated to make this Affidavit, and that the following facts are true and correct:

My name is PAT RUTHERFORD. I was the Chairman of

the Board and Chief Executive Officer of Land-Air, Inc., and I am presently living in Honolulu, Hawaii. I am personally familiar with the facts concerning a government contract for Type "G" Lifting Plugs, which was awarded in late 1971 or early 1972 by the Ammunition Procurement Supply Agency, APSA, then located at Joliet, Illinois. I believe the government contract on this procurement was numbered DAAA-09-72-C-0208 and it is my recollection that the bids were opened on or about December 3, 1971. I had determined that after the bids were opened the second lowest bid was submitted by my Company, Land-Air, Inc. Although we were at first determined to have filed a non-responsive bid, we amended our original bid which was received by the government on or about December 1, 1971, which re-instated our bid prior to the award. In connection with our bid on this matter and I believe that the records will show that our bid was .48678 ¢ per plug, we determined from our principal supplier, Link-Belt of Indianapolis, Indiana that they were unable to supply us the unfinished plug castings or rough castings as they could not produce them sufficiently early enough to comply with the government contract in issue. Accordingly, I informed the government officials at APSA, Joliet, Illinois that my Company did not have a supply source for the unfinished plug castings and that my Company, Land-Air, Inc., was, therefore, withdrawing its bid and we did so. My company never received a pre-award survey on this particular contract because our bid had been withdrawn and I understood government procurement regulations to require such a pre-award survey before any award as a prerequisite to obtaining all or part of the government contract in issue.

We have supplied these finished Type "G" Lifting Plugs on government contracts or APSA before the fall of 1971, but we had completed our last order about a year before or sometime in 1970 and had been out of production for substantially a year at the time we submitted the bid referred to hereinabove.

/s/ PAT RUTHERFORD

Thus, the affidavit reveals that Land-Air removed itself from

consideration for the award because it was informed by its supplier, Link-Belt, that Link-Belt could not supply the necessary raw castings. Referring again to Costa's testimony, this is the prime consideration in determining whether a contractor is "responsible". This makes abundantly clear the fact that Land-Air was not in contention for the contract in question.

The affidavit is "outside the record", but the record supports the obvious jury finding that Land-Air, without a pre-award survey or contract officer's determination that it was a responsible bidder, was not considered responsible and was not eligible for the award.

If petitioners are wrong, in this, it is submitted that bringing an incontrovertible fact to the attention of the court by affidavit is proper where the lower court's opinion is based upon an erroneous conclusion with respect to that fact and the entire disposition of the cause hangs in the balance. It is within the province of this court to reverse and remand for further development of the facts, where the integrity of the judicial process so demands. *U.S. v. Shotwell Mfg. Co.*, 78 S. Ct. 245, 355 U. S. 233, 2 L. Ed. 234; *Youngstown Sheet & Tube Co. v. Lucey Products Co.*, 403 F. 2d 135 (5th Cir. 1968). The latter case holds that although, generally, failure to put on all proof necessary for a judgment is fatal error, there are occasions when innocent, and justifiably unknowing litigants are entitled to a remand to insure that substantial justice be done. This is certainly such a case, for how could plaintiffs know that the Court would deny the use of the lower price to prove fact of damage, or that Land-Air would be called a viable bidder when the bid record indicated otherwise? Obviously, therefore, if the Court concludes that the record does not justify the jury's finding, justice requires that the case be remanded.

**2. Respondents' recalculations of the bid based upon the lower price extended H/R by Texas Foundries cannot be disregarded.**

The Court of Appeals' opinion concludes that the recalculation of the bid based upon the lower price extended by

Texas Foundries to H/R cannot be considered for the purpose of determining whether Universal would have been low bidder in the absence of the discriminating pricing scheme. This conclusion is based on the reasoning that the Sherman Act is designed to facilitate competition and eliminate anticompetitive acts, and that application of this basic principle requires that the lower price extended to H/R be disregarded. This conclusion is novel, and apparently of first impression, but it is without authority or reason.

Facilitation of competition generally promotes lower prices and more efficient business administration. It is more reasonable to conclude, as the jury was free to do, that since Texas Foundries had the ability to extend the lower price to one competitor, it should have extended the same price to all to whom it issued price quotations. Had it done so, the record shows that Universal could and would have submitted a lower bid than H/R, and would have obtained the award.

The lower price has to be treated as a fact. It was granted by Texas Foundries to H/R. It was a part of the basis for the jury's finding of the conspiracy, and constituted an overt act pursuant to the conspiracy. Obviously, it could be considered in measuring the extent of damages. (Support for this proposition is found in the cases cited in the initial discussion of REASONS FOR GRANTING THE WRIT, *Supra*. Certainly, therefore, there is no reason to deny use of the fact (of the lower price) to prove "fact" of damage, i.e., to prove that Universal would have secured the award had it secured the same price.

**The Robinson-Patman Question**

With regard to the Robinson-Patman claim, the Court recognizes that H/R and Universal purchased from Texas Foundries "contemporaneously", i.e., within the same time-frame, but holds that "plaintiffs have failed to prove that the purchases were made 'in competition'". The Court reached this conclusion because of its reasoning that "the government selection under both the 1970 contract and the December, 1971 contract of a single producer for each precluded the possibility of competition

between these suppliers as a matter of law". The Court categorized the separate contracts as "separate, distinct market(s) open only to a single producer".

The latter proposition clearly is not true, for the pre-award survey contained a request that the survey cover a 50-percent option of the quantity awarded. Therefore, H/R and Universal were in competition for either one-half or 100-percent of the quantity awarded, and could have wound up selling to the same customer (the government) under the same contract. Furthermore, the fact that H/R was ultimately awarded 100-percent of the contract quantity does not keep H/R and Universal from being "competitive purchasers" as required by the act. This proposition is established by *American Can Company vs. Bruce's Juices,* 187 F. 2d 919 (5th Cir. 1951) modified 190 F. 2d 73, 74. There it was established that *American Can* extended arbitrary and discriminatory terms to *Bruce's Juices* on a item known as the "3.12 Iscan" (a can used as a container for citrus juices sold in competition with bottled drinks). This prevented *Bruce's Juices* from buying any of the 3.12 Iscans, as pointed out by the Court at page 923:

> "The fact that it was denied the benefit of the lower price on the 3.12 Iscan in the above manner made it financially impossible for Plaintiff to purchase that particular Iscan along with its competitors."

This Court then held, however, that the failure of the Plaintiff to purchase the 3.12 Iscan did not deny the Plaintiff the status of a competing purchaser under the act, stating at page 924:

> ". . .Moreover, Plaintiff was not bound to purchase the 3.12 Iscan upon such terms in order to attain the status of a competing purchaser under the act, *as its failure to do so was directly attributable to Defendant's own discriminatory pricing."*

By the same token Universal's failure to purchase either

one-half or all of the contract quantity of the Type "G" lifting plugs for the contract in question from Texas Foundries was directly due to the discriminatory pricing scheme between H/R and Texas Foundries. *Bruce's Juices* establishes conclusively that this does not deny Plaintiffs the status of a "competing purchaser", and the lower court's opinion should be corrected in this regard.

## CONCLUSION

For the reasons set forth above, it is respectfully prayed that this Court grant writ of certiorari and reinstate the judgment of the district court, or alternatively, remand for further trial in the interests of justice.

Respectfully submitted,

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